April 30, 2008

VIA HAND DELIVERY AND ECF

Honorable Jed S. Rakoff
United States District Judge
Southern District of New York
500 Pearl Street, Room 1340
New York, NY 10007

Re: United States v. Omar Maldonado
S1 08 Cr. 231 (JSR)

Dear Judge Rakoff:

I write with reference to the above-captioned case to object, pursuant to Federal Rule of Criminal Procedure 30, to the Government's Requests to Charge Nos. 1(g), 1(k) and 1(m), 4, 6, 10, 11, 12, 13, 14, 17, 18, and 22, for the reasons set forth below.

I also note that, at several points in the titles to its requests, the government uses the phrase "convicted felon." See, e.g., Requests Nos. 3-7. The defense objects to any use of this phrase in the presence of the jury.

Request to Charge Nos. 1((g), 1(k) and 1(m): The government asks the court to give instructions regarding ("Government Treated Like Any Other Party," "Interest in Outcome" and "Sympathy: Oath as Jurors." Because these topics are covered in the Court's general instructions regarding all parties being considered equals, the credibility of witnesses, and the role of the jury, the defense asks that no particular instructions be given on these points.

Request No. 4 (Purpose of the Statute): I object to any instruction on the purpose of the statute. The jury is not ordinarily instructed on the policies motivating particular criminal laws and this particular instruction is highly prejudicial to the defendant in its references to "criminals," "violence," and "violent crime." Should the Court decide to give some instruction on this topic, I ask that the Court give the pattern instruction set forth at Sand, Modern Federal Jury Instructions, Instr. 35-46, rather than giving the modified instruction requested by the government.

Request No. 6 (Defendant's Prior Conviction): I object to the government's proposed instruction on defendant's prior conviction, and respectfully request that the Court either give the defendant's requested instruction on this element or the pattern instruction set forth in Sand, Modern Federal Jury Instructions, Instr. 35-48. The government's instruction inappropriately removes cautionary language regarding the prior conviction. The government omits the important instruction that "You are not to speculate as to what it was for" from the last paragraph. The government also omits the final clause of the instruction, which informs the jury that the defendant's possession of the gun is in dispute.

Request No. 10 (Defendant's Testimony): I ask that the Court give Defense Request No. 6, which stresses that the defendant's decision to testify does not shift the burden of proof.

Request No. 11 (Defendant's Right Not To Testify): I ask that the Court give its standard instruction or Defense Request No. 5, which explain briefly to the jury some of the reasons why a defendant may not testify.

Request No. 12 (Particular Investigative Techniques): I object to the giving of such an instruction; the Court already is instructing the jury that it may evaluate the evidence or lack of evidence. However, if the Court decides to give such an instruction, I ask that the pattern instruction set forth in Sand, Modern Federal Jury Instructions, Instr. 4-4, be given, with a single modification: in the last sentence of the pattern instruction, rather than referring to "the defendant's guilt" being proved, I would ask that the Court use "the elements of the offense have been proved." The government's requested instruction is unbalanced: it omits the pattern language regarding the appropriateness of the jury considering the government not using certain investigative techniques, and thus implies that the jury should not be able to consider the lack of such evidence at all. It also omits the language regarding the government having the burden of proof.

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Request No. 13 (Use of Evidence Obtained At Time of Arrest): There will be no dispute here about the admissibility of this evidence; accordingly, no such instruction is necessary. If the Court does give such an instruction, the defense objects to the use of the term "apprehended," rather than, e.g., "stopped," or "arrested," in the first line of the instruction proposed by the government. In the last line of the second paragraph, the defense asks that rather than speaking of the "defendant's guilt" – which intimates that he is in fact guilty, and the only question is whether the government has proved it – the instruction speak of "whether the Government has proved the elements of the offense beyond a reasonable doubt."

Request No. 14 (Limiting Instruction – Similar Act Evidence): If the Court decides to admit other act evidence, this instruction should be edited to specify a single act (not plural acts) and to focus on the specific basis on which the evidence is admitted.

Request No. 17 (Expert Testimony): I object to the government's proposed instruction regarding expert testimony and respectfully request that the Court give the pattern instruction set forth in Sand, Modern Federal Jury Instructions, Instr. 7-21. The government's proposed instruction omits critical parts of the standard instruction on expert witnesses by failing to inform the jury that an expert's opinion is not a substitute for the jury's common sense evaluation of the evidence and by failing to emphasize that the jury is the exclusive trier of the facts. The government's proposed instruction also puts undue stress on the jury's ability to rely on an expert's testimony by suggesting that the jury could put "great reliance" on an expert's testimony.

Request No. 18 (Law Enforcement Witnesses): I object to the government's weakening of the pattern instruction by omitting the language that "it is legitimate for defense counsel to try to attack the credibility," and by altering the final sentence to remove "if any" in the discussion of the weight to be given such testimony. I ask that the Court give Defense Request No. 3 on this topic, which hews much more closely to the pattern instruction.

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Request No. 22 (Conclusion): I object to the "Conclusion" instruction requested by the government and respectfully request that the Court give the pattern instruction on "Duty to Consult and Need for Unanimity" set forth in Sand, et.al., Modern Federal Jury Instructions, Instr. 9-7. The concluding remarks proposed by the government make no mention whatsoever of the government bearing the burden of proof. Such an omission is inappropriate.

Thank you for your consideration of these objections.

Respectfully submitted,

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cc: Nicole W. Friedlander
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